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No. 88-342

In the Supreme Court

OF THE

United States

OCTOBER TERM 1988

SUNSHINE HEALTH SYSTEMS, INC.
Plaintiff,

VS.

OTIS R. BOWEN,
Defendant.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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PROVIDER REIMBURSEMENT REVIEW BOARD

HEARING DECISION

83-D104R1

Date of Hearing — November 12, 1987

Provider — ST. JOSEPH'S HOSPITAL
SAN FRANCISCO, CA
Provider No.: 05-0370

VS

ermediary — BLUE CROSS AND BLUE SHIELD
ASSOCIATION/BLUE CROSS OF CALIFORNIA

Cost Reporting Period Ending —
August 31, 1975, 1976, 1977, 1978
and September 15, 1979
Case No. 81-183R1

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ISSUE:

t is the amount of reimbursement and interest due Provider?

SUMMARY OF FACTS:

The Provider Reimbursement Review Board (Board) originally heard this case on March 4, 1983, and issued Decision No. 83-D104 on July 5, 1983. That decision reversed the Intermediary's adjustments with respect to Issue 1 (Management Fees), and denied the Provider additional reimbursement for Issue 2 (Unemployment Benefit Payments) and Issue 3 (Pension Benefit Payments). The Board found that the Provider was not entitled to reimbursement for unemployment insurance costs incurred subsequent to its termination from the program. As to the pension issue, the Board found that these costs were includable in the Provider's final cost report. However, the Provider was not entitled to additional reimbursement because it was subject to the "lower-of-cost-or-charges" (LCC) limitation provisions of 42 CFR 405.455.

On September 6, 1983, the Deputy Administrator of the Health Care Financing Administration (HCFA) reviewed the Board's decision and affirmed the Board's decision as to Issue Nos. 1 and 3, and reversed as to Issue No. 2. The Deputy Administrator held that the unemployment insurance costs were allowable in the final cost report subject to the LCC limitation.

The Provider appealed the decisions of the Board and Deputy Administrator to the United States District Court for the Northern District of California. In an order dated September 5, 1984, in the case of *St. Joseph's Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, United States Department of Health and Human Services,* U.S.D.C., N.D. CA, No. C-83-4041-MHP, the Court remanded the decision to the Board with respect to Issues 2 and 3 as follows:

What is in question is the Secretary's treatment of termination costs — costs that are unique to closing — and her obligation to treat them within the meaning of Section 1395x(v)(1)(A)(ii). The Secretary may choose to allocate unemployment compensation and pension liability over the earlier cost years or she may devise a reasonable procedure for treating them as termination costs. Whatever procedure is used, plaintiff is entitled to reimbursement in an equitable amount in accordance with subparagraph (ii). The Secretary may not, however, disregard the provisions of that section.

AND

The case is remanded to the PRRB with instructions to allocate St. Joseph's pension and unemployment insurance costs in accordance with this Order and 42 U.S.C. Section 1395x(v)(1)(A)(ii) and grant St. Joseph's a reasonable reimbursement.

n January 31, 1986, the Acting Deputy Administrator, FA, remanded the matter to the Board for further eedings consistent with the Court Order.

ne Board reopened the proceedings under Case No. 83R on February 18, 1986, and ordered the parties to are and exchange with each other calculations, evi-ce, arguments and any other relevant information on amount of pension and unemployment insurance costs h should be allowed. Also, the parties were ordered to uss any differences in order to stipulate to the amount appropriate pension and unemployment insurance s to be reimbursed consistent with the Court Order.

'suant to the Board Order, the Provider and the nediary met and stipulated to the following:

The above referenced parties hereby stipulate on June 8, 1986, that the necessary steps have been implemented to exclude closing costs, pension costs and unemployment insurance cost from the routine cost limitation and lower cost and charge computation.

The amount due St. Joseph's Hospital of San Francisco, California, (Provider), is $1,425,437.

The amount due the Provider is comprised of two dollar amounts as reflected below:

Revised Balance due Provider	$ 580,560
Total Calculated Interest due the Provider.....	844,877
Total Amount due Provider	$1,425,437

Interest expense was calculated in accordance with 42 CFR 405.454(1).

e Board reviewed the record in Case No. 81-183R, ding the revised Notice of Program Reimbursement R) dated June 12, 1986 and the stipulation of the es, as to the amount of allowable pension and unemnent insurance costs pursuant to the Court Order Section 2608E and F of the Provider Reimbursement ual (HIM 15-1), as amended in April 1986. The d issued Decision No. 83-D104R on June 27, 1986, ng the allowable cost determinations of the parties to onsistent with the Court Order. However, since the lation of interest as determined under 42 CFR 54(1) was included in the parties' stipulation, the d examined that computation as well. Per its inter-

ion and application of 42 CFR 405.429 and 42 CFR 4(1), the Board found the total calculated interest e Provider to be excessive and determined that the st payment should have been approximately 00 ($580,560 × 11.875% × 61 months).

accordance with the stipulated settlement of the s negotiated on June 8, 1986, the Provider received ement payment in the amount of $1,425,437 on June 86. On June 26, 1986, the Intermediary advised the ler that the original interest determination had ncorrectly computed using a rate of 17.812 percent than the rate of 11.875 percent. Additionally, it so discovered that interest had been computed on ts favorably settled by the Board which were not f the Court's civil action. Based on its revised st computations, the Intermediary determined an yment amount due the Medicare program of ap- nately $488,700.

he scheduled hearing before the Court on June 30, he deadline date imposed by the Court for comple- f the Board's decision, the parties were ordered to briefs on the Board's finding with respect to the ive interest payment. After consideration of the ce and arguments presented by the parties, the issued an order on December 19, 1986, remanding se again to the Board for a full hearing in accor- with 42 CFR 405.1835 *et seq.*, to determine the t of reimbursement and interest due to the ff.

March 7, 1987, the Deputy Administrator, HCFA, ded Board Decision 83-D104R to the Board for r proceedings pursuant to the Court Order. The , on May 5, 1987, issued a notice of reopening and d order to the parties pursuant to the Deputy

istrator's remand. Subsequent to the receipt of the sions and position papers of the parties, an oral g was held on November 12, 1987, to provide the adequate opportunity to comment on the submit- dence, to raise pertinent objections, to examine and xamine witnesses and to propose findings of fact nclusions of law.

istent with the Court Order, the issue for this led case has been broadly stated to include both ount of reimbursement and interest due to the er. However, based on the submitted position pa- d stipulations of the parties at the Board hearing, ters relating to the amount of reimbursement for ncipal portion of the issue have been fully resolved. he interest amount, the parties further agree that ginal interest calculation erroneously applied inter- mounts favorably settled by the Board, which were t of the Court's civil action. Accordingly, the sole ing matter before the Board concerns the proper tion of prejudgment interest on the principal of $580,560, which represents the favorable civil settlement to the Provider as a result of the decision.

e the parties concur on the principal amount and e period for computing the interest, they disagree rate of interest to be applied and whether the t is to be compounded annually. The Provider's t calculation is based on a rate of 17.812 percent nded annually, which results in a total interest of $776,190 (Page 5 of Provider's Initial Position . By contrast, the Intermediary's calculation (Ex- — Intermediary's Position Paper) apportions the al balance of $580,560 between inpatient and out- based on the amount of services in each category

pplies a separate rate to each balance. A rate of
percent was applied to the inpatient balance of
46 (97.5 percent of $580,560), and a rate of 17.812
t was applied to the remaining balance of $14,514
ercent of $580,560) to yield a total interest amount
0,649. The Intermediary's calculation is based on
interest computed over a 62-month period. (The
ediary based its original calculation of interest on
onth period. The parties now agree that the calcula-
hould cover a 62-month period. Tr. p. 45, lines 24
5, and p. 46, line 1.) This variation in calculated
st reflects an amount in controversy of approxi-
$416,000.

ler's Contentions:

Provider contends that the payment of prejudg-
interest is governed by 42 USC Section
(f)(2), which provides for annual interest equal to
te of return on equity capital established by regula-
ursuant to 42 USC Section 1395x(v)(1)(B). The
tion established for governing the rates for return
ity capital is 42 CFR 405.429(a)(ii). At the time
was enacted, the rate for return on equity was one
e-half times the average of the rates of interest on
tions issued for purchase by the Federal Hospital
nce Trust Fund. This rate remained in effect until
1983 when a double standard became effective
guishing between "inpatient hospital services" for
the rate was reduced to one times the adopted rate,
all other services" for which the rate remained at
d one-half.

Provider argues that while a distinction between
ient hospital services" and "other proprietary hos-
ervices" may be relevant for the purposes of deter-

the rate of return on equity capital, there is no
ble reason to make this distinction in determin-
udgment interest. Moreover, the Provider doubts
effect on prejudgment interest was even consid-
en the change was made. It points out that the
of provisions for return on equity capital shows
reasons for the two-tiered approach are to en-
certain capital investments, and are totally unre-
the rate of interest to be included in a judgment.

the purpose of prejudgment interest is to provide
ayment of interest to the prevailing party (plain-
efendant), it is not intended to aid any one class
tiffs (providers) or even all plaintiffs. If the
nt were to prevail and a two-tiered approach is
e Provider believes it would be entirely unreason-
t the rate of interest would depend on the nature
laintiffs. While the Provider understands that the
annot rule on the constitutionality of a statute or
on, it believes that it is within the scope of the
jurisdiction to interpret statutes or regulations
ference to constitutional issues. If a statute arbi-
provides prejudgment interest for some plaintiffs
er rate than for others, without a logical basis for
inction, such discrimination violates the equal
on function of the Due Process Clause of the
mendment of the U.S. Constitution. In the instant
e Provider asserts that the discrimination was not
iberately enacted since it came about by accident.
ently, the Provider concludes that the one and
provision should prevail because it was in effect
ne statute was adopted and is the only single
d that ever existed.

Provider further contends that the effect of the
n by the Social Security Act of the rate of return

on equity capital requires the compounding of the interest. Since return on equity capital is computed and paid on an annual basis, this is the equivalent of compounding the interest because each year the provider is entitled to the use of the funds. The calculation of prejudgment interest based on simple interest, will not accomplish the same effect. The Provider asserts that if the money it received had been paid when due, the funds would have earned interest each year and the earned interest in turn would have produced interest. In summary, the Provider contends that the use of simple interest actually distorts the return on equity capital concept.

Intermediary's Contentions:

The Intermediary contends that its calculation is correct and represents the proper amount of interest due the Provider in accordance with the governing regulation, 42 CFR 405.454, for interest payments resulting from judicial review. As to the rate of interest, 42 CFR 405.454(1)(3) states that "The amount of interest to be paid is equal to the rate of return on equity capital (see § 405.429) in effect for the month in which the civil action is commenced. . . ." At the time the civil action for this case commenced on September 3, 1983, two different rates were in effect under 42 CFR 405.429(a)(ii) and (iii):

> (ii) Except as provided in paragraph (a)(1)(iii) of this section, the amount allowable on an annual basis is determined by applying to the provider's equity capital a percentage equal to one and one-half times the average of the rates of interest on special issues of public debt obligations issued to the Federal Hospital Insurance Trust Fund for each of the months during the provider's reporting period or portion thereof covered under the program.

For cost reporting period beginning on or after
l 20, 1983, the amount allowable in determining
return related to inpatient hospital services is
rmined using a percentage equal to the average
ne rates of interest as described in paragraph
1) (ii) of this section.

tent with this regulation, the rate for other than
hospital services is one and one-half times the
l average rates, and for inpatient hospital ser-
times those average rates. The rates of return in
September 1983 were 17.812 percent for other
atient services and 11.875 percent for inpatient
services.

ntermediary asserts that since the Provider fur-
oth inpatient and outpatient services, it properly
ned the principal balance between inpatient and
nt services and applied the correct interest rate
category. The Intermediary's calculation of pre-
t interest is presented in Exhibit 9 to its position

ponse to the Provider's contention that the inter-
be compounded annually, the Intermediary ar-
t if the Federal Government had envisioned the
ding of prejudgment interest, it would have
tated that in the regulation. Since the regulation
on this matter, the Intermediary believes a
nterest calculation is to be made when determin-
udgment interest. As further support for this
the Intermediary refers to Section 2219.2 of the
e Intermediary Manual (HIM 13-2) which indi-
at interest computed on overpayments and under-
s is computed as simple interest. It is the
diary's position that none of the Medicare pro-

gram's guidelines on the payment of interest envisions compounding.

CITATION OF APPLICABLE LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. *Law — Title XVIII Social Security Act:*
   - a. Section 1861(v)(1)(A) — Reasonable Cost
   - b. Section 1878(f)(2) — Judicial Review Interest
   - c. Section 1861(v)(1)(B) — Return on Equity Capital
2. *Regulations — 42 CFR 405, Subpart D:*
   - a. Section 405.429(a)(1) — Return on Equity Capital of Proprietary Providers — Rate of Return
   - b. Section 405.454(1) — Interest Payments Resulting from Judicial Review
3. *Program Instructions — Provider Reimbursement Manual, Part I (HIM 15-1):*
   Section 1206 — Return on Equity Capital of Proprietary Providers — Rate of Return

FINDINGS AND CONCLUSIONS:

The Board after consideration of the facts, parties' contentions, evidence presented and testimony elicited at the hearing finds and concludes that the prejudgment interest on the principal amount of $580,560 should be calculated using an annual simple interest rate of 17.812

computed over a 62-month period. The civil action nced in this case on September 2, 1983. The law zed a court in 42 USC 1395oo(f)(2) to award t in favor of the prevailing party on any amount a result of the court's decision. The law further ed for the payment of annual interest equal to the return on equity capital established in regulation nt to 42 USC 1395x(v)(1)(B). This statute was ented by 42 CFR 405.429(a)(1)(ii).

Secretary in 42 CFR 405.454(1)(3) directed that t to be paid the prevailing party would be equal to e of return on equity capital in effect for the month h the civil action commenced and cited 42 CFR for the calculation of that rate. The Board thus hat 42 CFR 405.429(a)(1)(ii) is the governing ion and that the Provider is to be paid a rate equal percent of the average of the rates of interest on issues of public debt obligations issued to the l Hospital Insurance Trust Fund in the month of im.

of the Law

974 Congress amended the Social Security Act (the provide interest in favor of the prevailing party on ount due as a result of the court's decision in cases t by providers under 1878 of the Act. Section 3 of 83-484, October 26, 1974, codified at 42 USC (f)(2) provided that:

) Where a provider seeks judicial review pursuant paragraph (1), the amount in controversy shall be bject to annual interest beginning on the first day the first month beginning after the 180-day period determined pursuant to subsection (a)(3) and ual to the *rate of return on equity capital* estab-

ished by regulation pursuant to section 861(v)(1)(B) and *in effect at the time the civil ction* authorized under paragraph (1) *is commenced,* o be awarded by the reviewing court in favor of the revailing party.

3C 1395oo(f)(2) (1974). Emphasis added.

e law thus provided for a rate of interest equal to the f return on equity capital established by regulation ant to 42 USC 1395x(v)(1)(B). This statute, v)(1)(B) of the Act, was added to the Act by § 7 of 966 Amendments to the Social Security Act, Pub.L. 3 enacted November 2, 1966. It required the Secre- o prescribe regulations providing for a return on capital for proprietary facilities providing ex- d care services, i.e., skilled nursing facilities. The num rate of return allowed in the statute was 150 nt of the average of the rates of interest on obliga- issued for purchase by the Federal Hospital Insur- Trust Fund. The statute reads as follows:

uch regulations in the case *of extended care services* urnished by proprietary facilities shall include pro- ision for specific recognition of a reasonable return n equity capital, including necessary working capi- al, invested in the facility and used in the furnishing f such services, in lieu of other allowances to the xtent that they reflect similar items. The rate of eturn recognized pursuant to the preceding sen- ence for determining the reasonable cost of any ervices furnished in any fiscal period *shall not ex- eed one and one-half times the average of the rates of nterest,* for each of the months any part of which is ncluded in such fiscal period, on obligations issued or purchase by the Federal Hospital Insurance Trust Fund.

2 USC 1395x(v)(1)(B) (1966). Emphasis added.

The Secretary in implementing 42 USC 395x(v)(1)(B) broadened the application to include all roprietary providers and set the rate of return at the aximum allowed by law.

> Principle. An allowance of a reasonable return on equity capital invested and used in the provision of patient care is allowable as an element of the reasonable cost of covered services furnished to beneficiaries *by proprietary providers.* The amount allowable on an annual basis is determined by applying to the provider's equity capital *a percentage equal to one and one-half times the average of the rates of interest* on special issues of public debt obligations issued to the Federal Hospital Insurance Trust Fund for each of the months during the provider's reporting period or portion thereof covered under the program.

2 CFR 405.429(a) (1966). Emphasis added.

Thus, this regulation served as the basis of the calculaon not only of the rate of return on equity capital for roprietary providers but also as the basis for the calculaon of interest awarded to prevailing parties under 1878 f the Act. The Secretary in implementing 1878 of the Act ad promulgated 42 CFR 405.454(1)(2) and (3), and in 3) had provided for the amount of interest to be paid by eferencing the regulation pertaining to the rate of return n equity. Section 405.454(1)(3) thus read as follows:

> Rate. The amount of interest to be paid is equal to the rate of return on equity capital (see § 405.429) in effect for the month in which the civil action is commenced.

2 CFR 405.454(1)(3).

The statute providing for interest awarded prevailing arties, 42 USC 1395oo(f)(2) has never been amended. o date it continues to cite 1861(v)(1)(B) of the Act, (42 SC 1395(v)(1)(B)), as the source for the alculation of interest for prevailing parties. Further, 42 FR 405.454(1)(3), which implemented 42 USC 395(v)(1)(B), has also never been amended and also ontinues to cite 42 CFR 405.429 as the source for the asis of the calculation of interest for prevailing parties.

This constancy stands in stark contrast to the situation ith respect to the rate of return on equity capital. Prior 1983 a single statutory provision, 42 USC 395x(v)(1)(B), governed the amount allowable, and, as dicated above, a single regulation, 42 CFR 405.429(a), nplemented this statute. Thus, both the statute and the gulation provided for a rate of return of 150 percent of e average of the rate of interest on special issues of ublic debt obligations issued to the Federal Hospital surance Trust Fund. While the statute pertained solely SNFs, the regulation, as indicated above, applied the te of return on equity to all proprietary providers.

In 1983, Congress reduced the allowable return for roviders of inpatient hospital services to 100 percent of e average of the rates of interest on special issues of ublic debt obligations issued for purchase by the Medi-re Part A Trust Fund. Congress did not amend 861(v)(1)(B) fo the Act, but rather, in 601(e) of the ocial Security Amendments of 1983 (Pub.L. 98-21) mended 1886 to the Social Security Act by adding bsection (g)(2). This was codified at 42 USC 395ww(g)(2). The provision read as follows:

> The Secretary shall provide that the amount which is allowable, with respect to reasonable costs of *inpatient hospital services* for which payment may be made

under this title, for a return on equity capital for hospitals shall, *for cost reporting periods beginning on or after the date of the enactment of this subsection*, be equal to amount otherwise allowable under regulations in effect on March 1, 1983, except that *the rate of return to be recognized shall be equal to the average of the rates of interest*, for each of the months any part of which is included in the reporting period, on obligations issued for purchase by the Federal Hospital Insurance Trust Fund.

USC 1395ww(g)(2)(1983). Emphasis added.

In implementing this statutory amendment, the Secrey amended 42 CFR 405.429 to add a new section rtaining solely to the rate of return on equity to be en to providers of inpatient hospital services. The rate SNFs, still determined by 42 USC 1395x(v)(1)(B), nained the same as before. Proprietary providers, ex- ot with regard to providers of inpatient hospital ser- es, were covered by 42 CFR 405.429(a)(1)(ii).

(ii) Except as provided in paragraph (a)(1)(iii) of this section, the amount allowable on an annual basis is determined by applying to the provider's equity capital a percentage equal to one and one-half times the average of the rates of interest on special issues of public debt obligations issued to the Federal Hospital Insurance Trust Fund for each of the months during the Provider's reporting period or portion thereof covered under the program.

oviders of inpatient services were covered by 42 CFR 5.429(a)(1)(iii).

(iii) For cost reporting periods beginning on or after April 20, 1983, the amount allowable in determining the return related to inpatient hospital ser-

vices is determined using a percentage equal to the average of the rates of interest as described in paragraph (a)(1)(ii) of this section.

Congress once again visited the issue of return on uity in the consolidated Omnibus Budget Reconcilia-n Act of 1985 and made several changes. Section 9107 this law amended sections 1861(v)(1), 1886(a)(4) and 66(g)(2) of the Act. Section 9107(a) of Pub.L. 99-272 ıended section 1886(g)(2) of the Act by mandating a ase-down (and eventual elimination) of payments for turn on equity capital for impatient hospital services mmencing with cost reporting period beginning on or ter October 1, 1986.

Section 9107(b)(2) of Pub. L. 99-272 amended section 61(v)(1)(B) of the Act to provide that, for cost report-g periods beginning on or after October 1, 1985, the rate return for SNFs must be equal to the average of the tes of interest on obligations issued for purchase by the edicare Part A Trust Fund. In addition, section 07(b)(1) of Pub. L. 99-272 added section 61(v)(1)(P) to the Act to provide that if payment for a turn on equity capital is provided for by regulations for rvices other than inpatient hospital services, the rate of turn to be recognized for determining the reasonable st of services furnished in a cost reporting period, ginning on or after October 1, 1985, must be equal to e average of the rates of interest on special issues of blic debt obligations issued for purchase by the Medi-re Part A Trust Fund. Thus, this latter provision plied only if the Secretary provided in regulations for e payment of a return on equity capital for costs other an inpatient hospital services. In effect, with the excep-n of inpatient hospital services and SNFs, Congress ve the Secretary discretion as to whether to pay a

rn on equity to other providers. The sole limitation on discretion was that if the Secretary chose to pay a rn, Congress set the allowable rate.

he Secretary implemented the new provisions in 52 21216 and 52 FR 32920. In 52 FR 21216, June 4, 1987, Secretary promulgated 42 CFR 413.157(b)(3) which uced program payment of a return on equity capital SNF services and outpatient hospital services for cost orting periods beginning on or after October 1, 1985, equal the average of the rates of interest on special es of public debt obligations issued for purchase by Part A Trust Fund. The Secretary at the same time mulgated 42 CFR 413.157(b)(4) which for cost re- ting periods beginning on or about October 1, 1985, before July 6, 1987, reduced program payment of a rn on equity capital for services of all nonhospital and -SNF proprietary providers to the average on interest special issues of public debt obligations issued for chase by the Part A Trust Fund. However, for cost orting periods beginning on or after July 6, 1987, the retary exercised his discretion to provide no allowance return on equity capital for nonhospital and non-SNF viders.

n 52 FR 32920, September 1, 1987, the Secretary, in exercising the discretion granted by Congress, inated the allowance for a return on equity capital for patient services furnished by proprietary hospitals ause "it is inappropriate to continue payment of re- n on equity capital for outpatient hospital services le the payment for inpatient hospital services is being sed out." 52 FR 32920. In the same Federal Register, Secretary promulgated 42 CFR 413.157(b)(2) to lement the phasing out of the return on equity for viders for inpatient hospital services. Congress, how-

r, rethought the issue of the application of return on
ity to outpatients and in Section 107(b)(1) of Pub.L.
-119 specified that the "final regulation . . . published
September 1, 1987 (52 FR 32920) and relating to
nges to the return on equity capital provisions for
patient hospital services is void and of no effect." 52
39639, Oct. 23, 1987. The applicable regulation, 42
.157, was again amended to retract the elimination of
eturn on equity for outpatient services. Id. (Vol. 42 of
Code of Federal Regulations revised as of October 1,
7 included this revision but failed to cite the appropri-
Federal Register issue, i.e. 52 FR 39637, Oct. 23,
7.)

alysis

As demonstrated by the foregoing review of law and
ulations, applying 42 CFR 405.454(1)(3) prior to 1983
a relatively straightforward matter. 42 CFR
.454(1)(3) directed the reader to 42 CFR 405.429 for
calculation of interest to be paid to the prevailing
ty. At 42 CFR 405.429 there was a single formula for
return on equity provided to all proprietary providers.
assume that this formula was used to calculate the
e of interest to be granted *all* prevailing parties re-
dless of the category of provider.

Neither the preamble for the proposed rule for 42 CFR
.454(1)(3) nor the final rule had any discussion of
ngress' purpose in making the rate of interest awarded
prevailing parties equal to the rate of return on equity.
r did they have any depth discussion of the Secretary's
de of implementation. However, while the Intermedi-
did not offer any legislative history for 42 USC
95oo(f)(2), Congress' action of making the rate of
erest resulting from judicial review equal to the rate of
urn on equity granted providers suggests a reasonable

tionale — to award the prevailing party interest at a te equal to that which Medicare deemed the provider uld earn on its money. In turn the Secretary's method- ogy in cross-referencing the two relevant regulations ppears reasonable since the referenced regulation of- red a single rate of interest which could be applied to all revailing parties.

In 1983 with the passage of Pub.L. 98-21, the cross- ferencing becomes very problematic. As a result of the nendments of Pub.L. 98-21 in 1983, as discussed above, here were, at the time the claim was filed in this case, two tes of return on equity — one for proprietary providers inpatient services and one for SNFs and outpatient rvice providers. 42 CFR 405.429 was amended to reflect ese changes. The Intermediary argued that because of e existence of two rates of return on equity at the time e claim was filed, there should also be two rates of terest awarded to prevailing parties — and that the levant rate in this case is to be found in 42 CFR 05.429(a)(1)(iii).

The Provider, however, could find no "conceivable" ason to make this distinction in determining interest sulting from judicial review. It argued that the reasons r the two-tiered approach existing in 1983 were to ncourage certain capital investments and were totally nrelated to the rate of interest to be included in a dgment. It further argued that "To use a lower rate of terest for hospitals with inpatient services and for other roviders appears to be so grossly inequitable and with- ut any supporting policy as to violate the equal protec- on function of the Due Process Clause of the Fifth mendment of the U.S. Constitution." (Provider's Posi- on Paper at p. 6).

Further, the Secretary did not provide in 1983 any idance or address the continued cross-referencing be- een 42 CFR 405.454(1)(3) and 42 CFR 405.429 in any blished document known to the Board or provide any ionale or policy support for the existence of two differ- ct rates of interest awarded to prevailing parties. More- er, to date, the cross-referencing still exists without planation, elaboration or guidance from the Secretary spite the proliferation of differing — and diminishing rates of equity for various categories of providers — a liferation due to legislative enactments in 1986 and 87 as outlined above. The Board is aware that COBRA d the ensuing regulatory changes do not govern this se. However, the Board has painstakingly examined the st-1983 history to understand the ramifications of the termediary's interpretation of 42 CFR 405.454(1)(3). short, the Intermediary's position, if applied to a claim ed in late 1987 or early 1988, would produce perhaps as ny as four different rates of interest awarded to differ- t categories of prevailing parties with no interest at all arded to nonhospital and non-SNF providers for cost porting periods beginning on or after July 6, 1987. This uation does not appear to have any rationale.

Indeed the entire post-1983 history of the cross-refer- ce regulations at issue suggests the lack of a coherent ationship between the two regulations. It also illus- tes the ensuing difficulty of establishing an interpreta- n and application of 42 CFR 405.454(1)(3) that has a pportable rationale for the case at issue and some basis r a plausible interpretation for subsequent cases. The ard does not find that the Intermediary's position fers such a rationale, nor does the Board find much help the Provider's challenge to the constitutionality of the termediary's calculations.

e face of this perplexing state of affairs, the Board
o the governing statute at the time that the claim in
se was filed and its implementing regulation. That
, 42 USC 1395oo(f)(2) clearly indicated that the
t to be awarded to the prevailing party should be
o the rate of return on equity capital established by
ion pursuant to section 1861(v)(1)(B) of the
Security Act and in effect at the time the civil
was commenced. The civil action in this case was
nced in September of 1983. At that time section
)(1)(B) provided for a rate of return on equity of
rcent of the average of the rates of interest on
ions issued for purchase by the Federal Hospital
nce Trust Fund. This statute was implemented
CFR 405.429(a)(1)(ii). Section 42 CFR
4(1)(3) cites 42 CFR 405.429 for the calculation of
t to prevailing parties. The Board finds that the
able section of that regulation is 42 CFR
9(a)(1)(ii).

Board is aware of the Ninth Circuit decision in
ne Health Systems, Inc., U.S. Court of Appeals,
Circuit, No. 87-6065, March 22, 1988 and the
refusal to reconsider its decision. The Provider,
ne Health Systems, Inc., is a proprietary provider,
e analysis of the Court of Appeals focused solely on
etary providers. The court reversed the decision of
strict court which, without opinion, had awarded
t to the proprietary hospital, Sunshine Health
ns, using the one and one-half factor.

court observed that Congress "inextricably" linked
lculation of interest paid to the prevailing party,
ed to as litigation interest by the court, with that
ed for the return on equity capital. The court
r stated that by providing for the return on equity

to proprietary facilities, Congress in effect "au-
the reimbursement of profit that would have
had the facilities been providing services not
by Medicare." *Sunshine* at CCH paragraph
It concluded that the Secretary's

construction is logical because it leaves health
providers who prevail following judicial review
Medicare decisions in the same position they
ld have been in the absence of such review. *Id.*

ourt apparently believed that Congress had cho-
quate litigation interest with the specific rate of
n equity awarded to the category of proprietary
in question because award of the return on
would make the provider whole. The Board does
e with the court's position and reasoning.

it is doubtful whether such an award would make
etary provider whole in the sense that the court
. A judgment giving the proprietary provider
imbursement for any given year would automati-
crease the provider's equity capital base and the
n equity capital calculated as prescribed by stat-
regulation. The provider would be left where it
ave been absent a reimbursement disagreement.
on interest would give the proprietary provider
ng more. It would in effect pay for the use of the
sement funds lost to the provider over time — a
for use of funds perhaps analogous to the inter-
ved by Congress in 28 USC 2516 in claims against
ted States in a judgment of the United States
Court under a contract or Act of Congress provid-
payment of litigation interest.

dly, it is clear that the award of litigation interest
same effect or performs the same function for

roprietary providers and nonproprietary providers
s them both for the loss of the use of funds.
ver, the court's theory seems predicated on the
or assumption that litigation interest was to be
ed solely to proprietary providers (to make them
and not to nonproprietaries. There is nothing,
er, on the face of 42 USC 1395oo(f)(2) to indicate
n intent on the part of Congress, and the court has
ed no legislative history to support this interpreta-
Further, the Secretary historically has awarded
ion interest to both proprietary and nonproprietary
ling parties. In fact, under the court's theory, non-
etaries receiving litigation interest would be receiv-
ore than proprietary providers since they were not
ents of a return on equity to begin with. Finally,
the inception of the Medicare program, a chief
ple of reimbursement has been that wherever possi-
.. the principles should result in the equitable
ent of both nonprofit organizations and profit-
g organizations." 42 CFR 405.402(b)(5). Any de-
e from this longstanding principle requires a rea-
explanation.

ar more plausible and reasonable interpretation of
ess' intent in enacting 42 USC 1395oo(f)(2) was
Congress intended to provide a payment to the
ling party — the provider or the federal govern-
— for the deprivation of the use of funds. As to a
f interest, it would appear reasonable for Congress
ose the rate of return on equity capital — the sole
f return on equity capital — in existence at the time
passage of 42 USC 1395oo(f)(2). It had already
mined that the rate of return on equity constituted a
return" on money that private investors put into the
tion of skilled nursing facilities. 112 Cong. Rec.
(1966) (Statement of Rep. Byrnes). Thus, Con-

ısed that reasonable figure in determining litiga-
nterest for all prevailing parties, including
prietary institutions and the federal government,
differentiation or distinction. Clearly there was no
le ever proferred or suggested by Congress for
ng litigation interest at varying rates to prevailing
depending on the category and corporate form of
ovider.

e is not only an absence of legislative history
ting such an outcome but also an absence of logic
should different providers be paid a different rate
rest on funds, the use of which they had been
d, when they all would have had an equal opportu-
invest their funds in the marketplace at a similar
t rate? Indeed, there would have to be a very clear
ssional intent expressed to produce such an out-
hen application of the statute itself produces a
ı litigation rate of interest.

Board's adherence to the exact language of the
ng statute, 42 USC 1395oo(f)(2), and its choice,
nformity with the statute, of 42 CFR
(a)(l)(ii) as the governing regulation in this case
s the award of a uniform rate of litigation interest
revailing parties regardless of category or corpo-
rm. The Board believes that this is the correct
etation of the intent of Congress.

DECISION

amount of reimbursement and interest due to the
er is approximately $1,114,840 ($580,560 Principal
nt + $534,280 Prejudgment Interest).

Members Participating:

D. Smith
s E. Bernard
E. Braganza
P. Owens (withdrew from any participation in this case in accordance with 42 CFR 405.1847)

THE BOARD:

nber 27, 1988

ELISE D. SMITH
Chairman

d

PROOF OF SERVICE BY MAIL

citizen of the United States and a resident of the
ıd County of Los Angeles; I am over the age of
n years and not a party to the within action; my
ss address is: 1706 Maple Avenue, Los Angeles,
nia.

ober 25, 1988, I served the within Supplement to
n for Writ of Certiorari in re: "Sunshine Health
s, Inc. vs. Otis R. Bowen" in the United States
ne Court, October term 1988 No. 88-342;

Parties in said action, by placing three copies
enclosed in a sealed envelope with postage fully
l, in the United States post office mail box at Los
s, California, addressed as follows:

Hon. Charles Fried
Solicitor General
U.S. Department of Justice
Washington, DC 20530

rties required to be served have been served.